UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 730

Case No. 795: SANCHEZ ORRICO

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Antonio Sanchez Orrico, a former staff member of the United Nations Educational, Scientific and Cultural Organization, hereinafter referred to as UNESCO, and a participant of the United Nations Joint Staff Pension Fund, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 March 1994;

Whereas, on 15 March 1994, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 12 May 1994, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "44. Consequently, the Applicant respectfully requests the Tribunal:
>
> (a) To rescind the decision contained in the letter from the Secretary of the United Nations Joint Staff Pension Board dated 1 June 1992 (...) and confirmed by the Standing Committee at its 175th meeting held on 29-30 June 1993 (...) whereby the Secretary of the Pension Board determined the

initial amount in local currency of the Applicant's early retirement benefit by applying a reduction factor of 6 per cent per year to the initial pension in dollars to which the Applicant would have been entitled on 31 December 1990;

(b) To order that the initial local-currency amount of the Applicant's early retirement benefit be recalculated by applying a reduction factor of 2 per cent and 3 per cent a year to the initial pension in dollars to which the Applicant would have been entitled on 31 December 1990, as provided in article 29 (b) (i) of the Regulations of the Pension Fund;

(c) To order that the pension, thus recalculated, be paid with effect from 18 January 1991, taking into account the adjustments applicable since that date.

45. The Applicant has suffered considerable injury due to the fact that, since 18 January 1991, he has been receiving a pension substantially lower than it should have been. That injury can be remedied only by the payment of appropriate interest. The Applicant does not consider that article 44 of the Regulations of the Pension Fund can be invoked in this instance. That article provides that 'the Fund shall not be liable for interest on any due but unpaid benefits'. That provision can only apply to normal delays which inevitably occur in the initial payment of pension entitlements but not to a situation in which, because of a misapplication of the law, the Fund pays a lower pension than is due. This is particularly true where the anomaly, as in the present case, extends over several years. It was on those grounds that, in its Judgement No. 313 (Passetti Bombardella), the Tribunal granted the Applicant retroactive interest 'for the damage he suffered as a result of the abnormal delay in the payment of his benefit'.

46. For this reason, the Applicant respectfully requests the Tribunal to order the Respondent to pay him interest, at a rate to be determined by the Tribunal, on the sums representing the difference between the pension actually paid and the pension that is due under the judgement of the Tribunal.

47. The Applicant also requests the Tribunal to award him costs, to be determined by the Tribunal for expenses incurred by him in the preparation and presentation of this application."

Whereas the Respondent filed his answer on 31 March 1995;

Whereas the Applicant filed written observations on 2 October 1995;

Whereas the facts in the case are as follows:

The Applicant was a participant in the United Nations Joint Staff Pension Fund (the Fund) from 16 January 1966, when he entered the service of UNESCO, until he separated from service on 31 December 1990.

In a letter dated 28 February 1991, the Secretary of the UN Joint Staff Pension Board (UNJSPB) advised the Applicant of the amounts of his initial periodic benefit as calculated, both on the US dollar track and on the Spanish local currency track, based on the date of his separation, i.e. 31 December 1990. Subsequently, UNESCO revised the Applicant's date of separation to 18 January 1991. This resulted in the Applicant's having completed the 25 years of contributory service required for the application of the 2 and 3 per cent reduction factors established in article 29(b)(i) of the Fund's Regulations, instead of the 6 per cent reduction factor applicable to the original separation date. Consequently, the Applicant's initial monthly dollar pension rose from $1,316.61 to $1,596.46. His benefit on the local currency track, established on the basis of his residence in Spain, was not altered.

In a letter dated 6 April 1992, the Applicant questioned the initial calculation of his local currency pension benefit, referring to an estimate he had received from UNESCO in September 1990. On 1 June 1992, the Secretary of the UNJSPB sent the Applicant a revised benefit letter, reflecting the amended date of separation, 18 January 1991, detailing the calculations made to establish the Applicant's benefit in local currency.

On 29 July 1992, the Applicant wrote to the Secretary of the UNESCO Staff Pension Committee, questioning the method adopted by the Secretary of the UNJSPB to calculate the Applicant's pension

benefit. In a reply dated 28 August 1992, the Secretary of the UNESCO Staff Pension Committee explained to the Applicant the effect of Administrative Rules J.4 and J.5 on the calculation of his initial US dollar and Spanish local currency benefits. He noted that "as you qualified for the transitional measure in paragraph 37 of the UNJSPF Pension Adjustment System, the Pension Fund had to calculate what your local-currency pension entitlement as of 31 December 1990 would have been, had you retired on that date." He further noted that, in determining eligibility for the 2 and 3 percentage reduction factors, Rule J.5 was applied and the Applicant's contributory service was calculated according to actual years, months and days of service (i.e. 24 years, 11 months and 16 days of contributory service).

On 15 October 1992, the Applicant lodged an appeal with the Standing Committee of the UNJSPB. On 13 August 1993, the Secretary of the UNJSPB advised the Applicant as follows:

> "Please be advised that, at its [175th meeting held on 29-30 June 1993], the Standing Committee decided to uphold the determination made by the Secretary of the Pension Board establishing the initial amount of your periodic benefit under the Fund's Pension Adjustment System. In reaching its decision the Standing Committee took full account of the provision of:
>
> (a) The transitional measure under the UNJSPF Pension Adjustment System, as adopted by the United Nations General Assembly (JSPB/G.12/Rev.2, para. 37);
>
> (b) Article 29(b) of the Fund's Regulations concerning eligibility for the favourable reduction factors for early retirement; and
>
> (c) Rule J.5 in the Pension Fund's Administrative Rules.
>
> A copy of the Fund's Regulations and Rules is enclosed for your information, together with a copy of the UNJSPF Pension Adjustment System. Please note that we are ready to respond to any further questions that you may have in connection with this matter.

We regret that, prior to your separation from UNESCO service, you may have received from the UNESCO Staff Pension Committee estimates of your early retirement benefit from the Pension Fund that apparently had not been calculated correctly. It should be stressed, however, that the estimates provided by UNESCO indicated clearly that they were tentative estimates and that an accurate determination of your entitlements could be made only after your actual separation from service. While we fully agree and appreciate that errors in estimates should be avoided to the maximum possible extent, we must also underscore the fact that erroneous estimates do not create benefit entitlements that would be either higher or lower than those prescribed under the Pension Fund's Regulations and Pension Adjustment System, as adopted by the UN General Assembly."

On 12 May 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent should have applied Administrative Rule J.4 to the calculation of the Applicant's contributory service for the purpose of determining the application of the transitional measure set forth in paragraph 37 of the Pension Adjustment System.

2. The calculation to be made did not involve determining eligibility for a benefit but rather the amount of the benefit, which should be calculated in accordance with Administrative Rule J.5.

Whereas the Respondent's principal contentions are:

1. Administrative Rule J.5, which deals with the calculation of contributory service for the purpose of determining eligibility for a benefit, was the proper rule to apply in determining the application of the transitional measure set forth in paragraph 37 of the Pension Adjustment System.

2. Administrative Rule J.4 is applicable only for the calculation of the amount of a benefit and not for purposes of eligibility.

The Tribunal, having deliberated from 31 October to 21 November 1995, now pronounces the following judgement:

I. The appeal before the Tribunal challenges a decision of the Standing Committee of the UNJSPB sustaining the determination by the Secretary of the UNJSPB of the Applicant's Spanish local currency track pension under the transitional measure set forth in paragraph 37 of the Fund's Pension Adjustment System. Issues relating to that transitional measure have previously been considered by the Tribunal in Judgement No. 589, Shousha (1993), and in other cases cited therein. The present application raises a question not previously considered by the Tribunal. It arises out of a claim by the Applicant, rejected by the Standing Committee, that Administrative Rule J.4 should be applied in determining the Applicant's eligibility for the transitional measure established by the General Assembly in December 1990, with respect to the local currency base amount of his early retirement pension.

II. The Applicant initially retired on 31 December 1990, at the age of 56, with 24 years, 11 months and 16 days of contributory service. The Applicant's separation date of 31 December 1990 was subsequently revised to 18 January 1991. As of his revised separation date, the Applicant had completed 25 years of contributory service. That made him eligible for favourable reduction factors relating to early retirement, as provided in Article 29(b)(i) of the Fund's Regulations, for which he would not have been eligible had his retirement date been 31 December 1990. The change in date thus increased his initial dollar pension. However, the revision of the Applicant's separation date, to 18 January 1991, was determined by the Fund to have no effect on the Applicant's initial local currency benefit under the 1990 transitional measure referred to above. Paragraph 37 of that measure speaks of eligibility for benefits in the following terms:

> "Participants in the Professional and higher categories, who separated from service or died in service between 1 January 1991 and 31 March 1992, and who were age 55 or above on 31 December 1990, shall be entitled to no less than the local currency base amount to which they would have become entitled under paragraphs 35 and 36 above, if they had separated on 31 December 1990, at the age and with the final average remuneration and contributory service attained on that date." (Emphasis added)

III. In short, the General Assembly, contrary to the view expressed in the dissenting opinion, did not fragment the conditions for eligibility, but made a participant's eligibility to the local currency base amount of his pension under the formula prescribed in paragraph 35 of the interim transitional measure, dependent on what his or her situation would have been as of 31 December 1990, inter alia, with respect to contributory service attained on that date.

IV. The Applicant's position, in a nutshell, is that the determination of his contributory service attained on 31 December 1990 should be based on Administrative Rule J.4 of the Fund concerning incomplete months of contributory service. That Rule provides:

> "The contributory service of a participant which is used as a multiple to obtain the rate or amount of any particular benefit shall be calculated in years and fractions of years, each complete calendar month being deemed equal to one twelfth of a year, and the total number of days comprised in the incomplete calendar months being apportioned by the addition of one month for each 30 days or part thereof of 15 days or longer; a residual period of less than 15 days shall be disregarded."

The Applicant's contention is that this Rule should be applied to his situation as of 31 December 1990. Because on that date he had 24 years, 11 months and 16 days of contributory service, that period would be rounded up to 25 years. This would make him eligible for the favourable reduction factors provided for in Article 29(b)(i) of the Fund Regulations, and hence to a more favourable local currency

base amount under paragraph 35 of the interim transitional measure, thus increasing the local currency base amount of his pension.

V. The Respondent's position is that Administrative Rule J.4 has no application to determine eligibility of a participant for a particular benefit. The Respondent argues that an Administrative Rule cannot alter, much less enlarge, eligibility terms expressly provided in a Regulation established by the General Assembly. According to the Respondent, this would be equally true with respect to Article 29(b)(i), and paragraphs 35 and 37 of the transitional measure. In the Respondent's view, if there was need to apply an Administrative Rule in order to determine the Applicant's eligibility under that article or those paragraphs, Administrative Rule J.5 would be the correct rule. That Rule provides:

> "The contributory service of a participant which is used to determine his eligibility for a benefit shall be calculated according to the actual years, months, and days comprised therein; for the purpose of determining his final average remuneration, incomplete months shall be disregarded ..."

The Applicant argues that this Rule is applicable only with respect to the question of whether a participant in the Fund is entitled to a pension. But the language of the Rule is not so limited. It refers to "eligibility for a benefit" (emphasis added). Indeed, the application of Rule J.5 to the Applicant's eligibility for the favourable reduction factors under Article 29(b)(i) to his dollar pension would have prevented him from receiving the benefit of those factors, had he not obtained the revision of his retirement date. Moreover, the Tribunal notes that, in keeping with Article 4(b) of the Regulations, Rule J.5 is entirely consistent with paragraph 37 of the interim transitional measure. The latter contains not the slightest suggestion of any possibility of adjustment, up or down, in "contributory service attained" as of

31 December 1990. Moreover, the Respondent points out that its consistent practice has been to apply Rule J.5 in determining eligibility and, thereafter, to apply Rule J.4 in the calculation of the amount of the benefit for which the participant was found to be eligible. This assertion appears to be undisputed. The Respondent also notes that there would be no need for Rule J.5, if both eligibility and the rounding process in a calculation were determined by Rule J.4. Nevertheless, the Respondent may wish to consider clarifying the language of Rule J.4 so as to eliminate possible future confusion with respect to it.

VI. The Tribunal finds that the issue in this case is governed by the clear and unambiguous language of the General Assembly, reflected in paragraph 37. In the light of that language, and in view of the objective sought to be achieved by the General Assembly in adopting the interim transitional measure for calculation of the local currency base amount, there can be no doubt that it intended eligibility to be dependent on a determination of the final average remuneration and contributory service as of 31 December 1990. (Cf. Judgement No. 589, Shousha (1993)). As to Rules J.4 and J.5, the Tribunal accepts the Respondent's contention that Rule J.5 is the proper rule applicable to this case.

VII. The Applicant has argued that he relied, to his detriment, on an erroneous estimate of his pension benefits, which he received from UNESCO, and which appears to have been based on the latter having shared the Applicant's erroneous interpretation regarding the effect of the Administrative Rules. The Tribunal regrets that the Applicant was misled, but finds no merit in this contention. First, estimates are tentative. That was made clear by a cautionary note he received with the estimate. Second, the amount ultimately received by the Applicant was essentially the amount estimated in 1990 before the 21 December 1990 transitional measure adopted by the

General Assembly. In any case, neither an incorrect estimate nor an erroneous UNESCO interpretation creates an entitlement greater or smaller than the entitlement under the applicable Regulations, Rules, or the Pension Adjustment System.

VIII. The Tribunal realizes, of course, that, had the Applicant known in early 1990, when he decided to retire, what the eventual consequence would be with respect to his local currency track pension under the 21 December 1990 transitional measure, he might have made a different decision with respect to early retirement. But that is not a matter that the Tribunal can deal with. As the Tribunal has previously held, it is not empowered to rewrite existing Regulations or to create new Regulations for the Pension Fund. And, as the Tribunal has also previously noted, interim transitional measures invariably result in some who benefit from them and some who do not. (Cf. Judgement No. 589, Shousha, paragraphs XI-XIII (1993)). Finally, the Tribunal notes that, although the Applicant did not benefit from the interim measure set forth in paragraph 37 of the Pension Adjustment System, he did benefit from the earlier interim adjustment measure that applied to his entitlement.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President, presiding

Mikuin Leliel BALANDA
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

* * *

DISSENTING OPINION BY MR. LUIS DE POSADAS MONTERO

I share the Applicant's view. In my opinion, the benefit to which the Applicant is entitled under paragraph 37 of the interim transitional measure approved by General Assembly resolution 45/242 of 21 December 1990, should be calculated according to Rule J.4.

Paragraph 37 provides that the benefit established by paragraph 35 of the transitional measure shall also be applicable to those staff members retiring between 1 January 1991 and 31 March 1992, under certain conditions. Paragraph 37 sets forth those conditions and provides the method for calculating the benefit established by the transitional measure.

The first part of paragraph 37 deals with the conditions required for eligibility for the benefit, i.e. that the staff member must be in the Professional and higher category, have separated from service between certain dates and be over age 55.

The second part of paragraph 37 deals with the way in which the benefit is to be calculated and provides that it would be "no less than the local currency base amount to which [the staff member] would have become entitled ..., if ([he/she] had separated on 31 December 1990, at the age and with the final average remuneration and contributory service attained on that date."

The level of the final average remuneration and contributory service attained by the staff member on 31 December 1990, referred to in the last sentence of paragraph 37, is not connected with eligibility. The staff member that has met the requirements mentioned in the first part of paragraph 37 is eligible, irrespective of the level of the final remuneration and contributory service attained by 31 December 1990. What remains to be determined, on the basis of the level reached on 31 December 1990, is the way the benefit is to be calculated. In the case of the Applicant, there is no contention as to his eligibility. His right to the benefit under paragraph 37 is not under discussion. The

discussion arises as to whether he should be subject to a 2 per cent reduction or a 6 per cent reduction, a matter clearly connected with the calculation of the amount of the benefit.

Therefore, Rule J.4 should be applied.

For the foregoing reasons, I disagree with the Judgement.

(Signature)

Luis de POSADAS MONTERO
Vice-President

New York, 21 November 1995

R. María VICIEN-MILBURN
Executive Secretary